Solai Realty Sdn Bhd v United Overseas Bank (M) Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02(IM)-2099–09 OF 2012
RAMLY ALI, MOHTARUDIN BAKI AND DAVID WONG JJCA
2 JANUARY 2013

Civil Procedure — Pleadings — Amendment — Defective pleadings — Whether claim that can be saved by amendment not to be struck out summarily

Civil Procedure — Striking out — Application for — Whether plain and obvious case for striking out — Affidavit evidence — Whether affidavit evidence admissible where limb of O 18 r 9(1)(a) of the Rules of the High Court 1980 relied on together with limbs (b), (c) and (d) — Whether issues of wrong forum, res judicata, inconsistent or conflicting decisions and that claim was bound to fail were serious issues that needed to be determined at trial

The appellant was a third party chargor who had charged its land to the respondent as security for banking facilities granted by the respondent to one Percetakan Solai Sdn Bhd ('borrower'). The appellant's claim against the respondent was based on negligence ie that the respondent had acted negligently and/or in breach of the charge agreement when the respondent unilaterally terminated the loan agreements with the borrower although the borrower was not in breach of the loan agreements. As a result of this, the borrower suffered cash flow problems and defaulted in repaying the facilities, thus exposing the appellant's charged properties to foreclosure proceedings. The respondent applied to strike out the appellant's writ and statement of claim under O 18 r 19(1)(a), (b) and (d) of the Rules of the High Court 1980 ('RHC). The respondent contended that: (a) the appellant's writ displayed no reasonable cause of action; (b) the appellant's relief lay in the foreclosure action and not in the writ action; (c) the appellant's writ was res judicata as its basis had been heard in the foreclosure proceedings; (d) any judgment given in the present suit may potentially conflict with the order for sale already granted; and (e) the contemporaneous and undisputed documents did not support the appellant's action. The learned High Court judge ('judge') allowed the respondent's application and hence the present appeal.

Held, allowing the appeal with costs in the cause and remitting the matter to the High Court for trial:

(1) An applicant for a striking out under O 18 r 19 can rely on any one or more than one sub-para (a) to (d). An application under this rule is not

void and ineffective merely because sub-para (a) had been pleaded together with sub-paras (b), (c) and (d); *Malayan United Finance Bhd lwn Cheung Kong Plantation Sdn Bhd dan lain-lain* [2000] 2 MLJ 38 referred; *Pegasus Engineers Sdn Bhd v Sambu (M) Sdn Bhd* [1998] 4 MLJ 129 referred (see para 9).

(2) Since the respondent's application was also based on sub-para (1)(a), the learned judge should have dealt with the said sub-para notwithstanding the fact that both parties had filed their respective affidavits. Those affidavits were actually to be used for the other two sub paras (b) and (d) (see para 10).

(3) The statement of claim, assuming the factual allegations were true or proven and without looking at the affidavit evidence, clearly disclosed a cause of action for negligence or had raised some questions fit to be decided by the court. The statement of claim was not hopeless, baseless or without any foundation in law. The statement of claim may not be perfect and 'not-so strong' to support the appellants' claim; but the mere fact that the case is weak and is unlikely to succeed at trial is not a ground for the claim to be struck out before trial. Thus, the appellant's statement of claim was not appropriate to be struck out under sub-para (1)(a) of r 19; *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corp Bhd* [1993] 3 MLJ 36 referred; *Loh Holdings Sdn Bhd v Peglin Development Sdn Bhd* [1984] 2 MLJ 105 referred (see paras 11 & 12).

(4) The power to strike a case under O 18 r 19 of the RHC without having to go for trial should be exercised sparingly and only in a plain and obvious case. The party affected should not be deprived of his right to have his case proceeded by a proper trial unless the claim is obviously unsustainable; *CC Ng & Brothers Sdn Bhd v Government of State of Pahang* [1985] 1 MLJ 347 referred (see para 20).

(5) Where pleadings are defective and the opposing party seeks to strike out the pleadings, the court ought not to act summarily if an amendment can correct the defect; *Kuala Lumpur Finance Bhd v KGV & Associates Sdn Bhd* [1995] 1 MLJ 504 referred; *Lim Weow @ Lim Neu v Perwira Habib Bank Malaysia Bhd* [2001] MLJU 328 referred (see para 22).

(6) The learned judge had erred in striking out the appellants' claim. The issues of wrong forum, res judicata, inconsistent or conflicting decisions, and that the claim was bound to fail, were all serious issues that needed to be determined at trial. They involved questions of law and fact that required mature considerations and further argument (see paras 24–25).

[Bahasa Malaysia summary

Perayu merupakan penggadai pihak ketiga yang telah memajakkan tanahnya kepada responden sebagai cagaran bagi kemudahan perbankan yang diberikan

oleh responden kepada Percetakan Solai Sdn Bhd ('peminjam'). Tuntutan perayu terhadap responden adalah berdasarkan kecuaian iaitu bahawa responden telah bertindak cuai dan/atau melanggar perjanjian pajakan apabila responden secara sebelah pihak, menamatkan perjanjian pinjaman dengan peminjam walaupun peminjam tidak melanggar perjanjian-perjanjian pinjaman. Akibatnya, peminjam mengalami masalah aliran tunai dan gagal membayar semula kemudahan-kemudahan tersebut, sekali gus mendedahkan hartanah-hartanah perayu kepada prosiding perampasan. Responden memohon untuk membatalkan writ dan penyataan tuntutan di bawah A 18 k 19(1)(a), (b) dan (d) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Responden menghujahkan bahawa: (a) writ perayu tidak menzahirkan kausa tindakan yang munasabah; (b) relief perayu terletak pada tindakan perampasan dan bukan dalam tindakan writ tersebut; (c) writ perayu adalah res judicata kerana hujahan-hujahannya telah dibicarakan dalam prosiding perampasan; (d) apa-apa penghakiman yang diberikan dalam saman ini mungkin akan bercanggah dengan perintah jualan yang telah dibenarkan; dan (e) dokumen-dokumen semasa dan yang tidak dipertikaikan tidak menyokong tindakan perayu. Hakim Mahkamah Tinggi ('hakim') membenarkan permohonan responden dan dengan itu, rayuan ini.

Diputuskan, membenarkan rayuan dengan kos dalam kausa dan meremit perkara ke Mahkamah Tinggi untuk perbicaraan:

(1) Sesuatu permohonan untuk pembatalan di bawah A 18 k 19 boleh bersandarkan pada mana-mana satu atau lebih daripada satu sub-perenggan (a) hingga (d). Suatu permohonan di bawah kaedah ini adalah tidak sah dan tidak mempunyai kesan semata-mata kerana sub-perenggan (a) telah diplidkan bersama-sama dengan sub-perenggan (b), (c) dan (d); *Malayan United Finance Bhd lwn Cheung Kong Plantation Sdn Bhd dan lain-lain* [2000] 2 MLJ 38 dirujuk; *Pegasus Engineers Sdn Bhd v Sambu (M) Sdn Bhd* [1998] 4 MLJ 129 dirujuk (lihat perenggan 9).

(2) Oleh kerana permohonan responden juga berdasarkan sub-perenggan (1)(a), hakim menangani sub-perenggan tersebut walaupun fakta bahawa kedua-dua pihak telah memfailkan afidavit masing-masing. Afidavit tersebut sebenarnya akan digunakan bagi dua sub-perenggan (b) dan (d) (lihat perenggan 10).

(3) Penyataan tuntutan tersebut, dengan menganggap dakwaan fakta-fakta tersebut adalah benar atau terbukti dan tanpa melihat keterangan afidavit, jelas menyatakan kausa tindakan kecuaian atau telah menimbulkan beberapa persoalan-persoalan yang sesuai diputuskan oleh mahkamah. Penyataan tuntutan tersebut tidak sia-sia, tidak berasas atau tanpa apa-apa asas dalam undang-undang. Penyataan tuntutan tersebut mungkin tidak sempurna dan 'tidak begitu kuat' untuk menyokong

dakwaan perayu, tetapi fakta bahawa kes tersebut adalah lemah dan berkemungkinan tidak akan berjaya ketika perbicaraan bukan alasan untuk membatalkan tuntutan sebelum perbicaraan. Oleh itu, penyataan tuntutan perayu tidak wajar dibatalkan di bawah sub-perenggan (1)(a) k 19; *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corp Bhd* [1993] 3 MLJ 36 dirujuk; *Loh Holdings Sdn Bhd v Peglin Development Sdn Bhd* [1984] 2 MLJ 105 dirujuk (lihat perenggan 11).

(4) Kuasa untuk membatalkan kes di bawah A 18 k 19 KMT, tanpa perlu dbicarakan perlu dilaksanakan dengan berhati-hati dan hanya dalam kes yang jelas. Pihak yang terlibat tidak boleh dinafikan hak untuk memastikan kes tersebut diteruskan dengan perbicaraan yang betul melainkan jika tuntutan tersebut jelas tidak mapan; *CC Ng & Brothers Sdn Bhd v Government of State of Pahang* [1985] 1 MLJ 347 dirujuk (lihat perenggan 20).

(5) Jika rayuan adalah cacat dan pihak lawan bercadang untuk membatalkan rayuan tersebut, mahkamah tidak sepatutnya bertindak terus jika pindaan boleh memperbetulkan kecacatan tersebut; *Kuala Lumpur Finance Bhd v KGV & Associates Sdn Bhd* [1995] 1 MLJ 504 dirujuk; *Lim Weow @ Lim Neu v Perwira Habib Bank Malaysia Bhd* [2001] MLJU 328 dirujuk (lihat perenggan 22).

(6) Hakim telah terkhilaf dalam membatalkan tuntutan perayu. Isu-isu forum yang salah, res judicata, keputusan tidak konsisten atau bercanggah, dan bahawa tuntutan tersebut berkemungkinan gagal, adalah kesemuanya isu-isu serius yang perlu diputuskan dalam perbicaraan. Kesemuanya melibatkan persoalan undang-undang dan fakta yang memerlukan pertimbangan matang dan hujahan lanjut (lihat perenggan 24–25).]

Notes

For cases on amendment, see 2(3) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 6179–6218.

For cases on application for striking out, see 2(4) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 7984–7991.

Cases referred to

Attorney-General of Duchy of Lancaster v London & North Western Railway Co [1892] 3 Ch 274, CA (refd)

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corp Bhd [1993] 3 MLJ 36, SC (refd)

Boey Oi Leng (Trading as Indah Reka Construction and Trading) v Trans Resources Corporation Sdn Bhd [2001] MLJU 566; [2001] 4 AMR 4807, HC (refd)

CC Ng & Brothers Sdn Bhd v Government of State of Pahang [1985] 1 MLJ 347, FC (refd)

Castro v Murray (1875) LR 10 Ex 213 (refd)
Eng Mee Yong & Ors v V Letchumanan [1979] 2 MLJ 212, PC (refd)
Indah Desa Saujana Corp Sdn Bhd & Ors v James Foong Cheng Yuen, Judge, High Court Malaya & Anor [2008] 2 MLJ 11, CA (refd)
Kuala Lumpur Finance Bhd v KGV & Associates Sdn Bhd [1995] 1 MLJ 504, HC (refd)
Lim Weow @ Lim Neu v Perwira Habib Bank Malaysia Bhd [2001] MLJU 328; [2001] 2 AMR 1307, HC (refd)
Loh Holdings Sdn Bhd v Peglin Development Sdn Bhd [1984] 2 MLJ 105, FC (refd)
Malayan Banking Berhad v Gan Kong Yam [1972] 1 MLJ 32 (refd)
Malayan United Finance Bhd lwn Cheung Kong Plantation Sdn Bhd dan lain-lain [2000] 2 MLJ 38; [2000] 2 CLJ 601, HC (refd)
Murray v Epsom Local Board [1897] 1 Ch 35, Ch D (refd)
Pegasus Engineers Sdn Bhd v Sambu (M) Sdn Bhd [1998] 4 MLJ 129, CA (refd)
Tay Bok Choon v Tahansan Sdn Bhd [1987] 1 MLJ 433, PC (refd)
Vernazza, Re [1959] 2 All ER 200 (refd)

Legislation referred to

Rules of Court 2012
Rules of the High Court 1980 O 18 r 19, O 18 r 19(1)(a), (b), (c), (d), (2)

Paul Kwong (SY Kwa with him) (Azman Davidson & Co) for the appellant.
Lim Siew Ming (Loke Yuan Hong with him) (Raja Darryl & Loh) for the respondent.

Ramly Ali JCA (delivering judgment of the court):

THE APPEAL

[1] The appellant in the present appeal was the plaintiff in the court below. The appeal before us is against the decision of the learned High Court judge dated 14 August 2012 in striking out the appellant's writ and statement of claim with costs under O 18 r 19 of the former Rules of the High Court 1980 ('RHC') (now Rules of Court 2012).

THE APPELLANT'S CLAIM

[2] The appellant at the material time was a third party chargor who had allowed its land vide Title No PN 10408, Lot 18, Section 20; Title No PN 10410, Lot 19 Section 20; and Title No PN 10411 Lot 20, Section 20, all at Petaling Jaya City Petaling District, Selangor to be charged to the respondent as security for several banking facilities granted by the respondent to one Percetakan Solai Sdn Bhd ('the borrower').

[3] The appellant's claim against the respondent is based on negligence ie that the respondent had acted negligently and/or in breach of its obligations under the charge agreement between the appellant (as chargor) and the respondent (as chargee) when the respondent unilaterally terminated the loan agreements with the borrower, particularly unilaterally terminating the banking facilities and/or refused to honour the banking facilities, though the borrower at the material time was not in breach of its responsibility under the loan agreements; and as a result of the respondent's negligence the borrower had suffered cash flow problems and defaulted in making repayment under the said banking facilities and thus exposed the appellant's charged properties to foreclosure action filed via OS No MT 24–2033 of 2008 in the High Court of Shah Alam by the respondent. The appellant filed its writ and statement of claim at the Shah Alam High Court on 30 November 2010.

[4] On 10 June 2011 the respondent filed an application to strike out the appellant's writ and statement of claim under O 18 r 19(1)(a)–(b) and (d) of the former RHC 1980 on the grounds that:

(a) the writ and statement of claims discloses no reasonable cause of action (O 18 r 19(1)(a));

(b) the action is frivolous, scandalous and vexatious (O 18 r 19(1)(b)); and

(c) the action is an abuse of the process of the court (O 18 r 19(1)(d)).

[5] On 14 August 2012 the learned High Court judge allowed the respondent's application. Hence the present appeal before us.

THE RESPONDENT'S ARGUMENTS

[6] Learned counsel for the respondent contended that the learned judge did not exercise her discretion wrongly and her findings of law and facts are correct for these reasons:

(a) the appellant's writ against the respondent displays no reasonable cause of action;

(b) the claim in the appellant's writ against the respondent is made in a wrong forum; the appellant's relief lies in the OS and not in the writ action. This renders the action an abuse of court process and/or frivolous;

(c) the appellant's writ against the respondent is res judicata as its basis has been heard and decided upon thus rendering the action an abuse of court process, frivolous and/or vexatious;

(d) to persist with the action will result in an undesirable consequence as a judgment at the disposal of the action will be inconsistent and/or

conflicting with the order for sale already granted; this renders the action vexatious and/or and abuse of court process;

(e) the appellant's writ against the respondent is premised on facts which do not exist anymore or are superseded by events; this renders the action frivolous, and its continuation is an abuse of court process; and

(f) the appellant's writ against the respondent is bound to fail; contemporaneous and undisputed documents do not support the action.

OUR FINDINGS

[7] In the summons in chambers dated 10 June 2011 for the striking out application, the respondent rested its application pursuant to O 18 r 19(1)(a)–(b) and (d) of the RHC and inherent power of the court. For the purpose of the present appeal, we shall deal with all the three limbs of the said r 19(1).

[8] For convenience, the full text of r 19(1)–(2) is reproduced below:

> 19 Striking out pleadings and indorsements (O 18 r 19)
>
> (1) The court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement, of any writ in the action, or anything in any pleading or in the indorsement, on the ground that-
>
> (a) it discloses no reasonable cause of action or defence, as the case may be; or
>
> (b) it is scandalous, frivolous or vexatious; or
>
> (c) it may prejudice, embarrass or delay the fair trial of the action; or
>
> (d) it is otherwise an abuse of the process of the court; and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.
>
> (2) No evidence shall be admissible on an application under paragraph (1) (a).

[9] An applicant for a striking out under O 18 r 19 can rely on any one or more than one sub-paras (a)–(d). So far, there is no authority to say otherwise. *Halsbury's Laws of Malaysia* clearly confirms that an applicant under this rule is entitled to rely on any or all of the grounds specified in the rule. An application under this rule is not void and ineffective merely because sub-para (a) had been pleaded together with sub-paras (b)–(d). The only limitation imposed under sub-r (2) is that for an application under sub-para (a), no evidence is admissible. However, where the court proceeds to decide an application under any other sub-paragraphs, affidavit evidence should be admissible. Even

though sub-paras (b)–(d) are to be read disjunctively, it does not mean that an applicant cannot rely on more than one sub-paragraph in his application, (see *Malayan United Finance Bhd lwn Cheung Kong Plantation Sdn Bhd dan lain-lain* [2000] 2 MLJ 38; *Pegasus Engineers Sdn Bhd v Sambu (M) Sdn Bhd* [1998] 4 MLJ 129 and *Malaysian Court Practice 2007* Desk Edition (High Court) p 239).

[10] In the present case since the application by the respondent is also based on sub-para (1)(a), the learned judge should have dealt with the said sub-paragraph notwithstanding the fact that both parties had filed their respective affidavits. Those affidavits are actually to be used for the other two sub-paras (b) and (d).

[11] We have scrutinised the statement of claim filed by the appellant against the respondent in the present case. We are of the view that the statement of claim, assuming the factual allegations are true or proven and without looking at the affidavit evidence, clearly discloses a cause of action for negligence or has raised some questions fit to be decided by the court. The statement of claim is not hopeless, baseless or without any foundation in law. The statement of claim may not be perfect and 'not-so strong' to support the appellants' claim; but the mere fact that the case is weak and is unlikely to succeed at trial is not a ground for the claim to be struck out before trial (see *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corp Bhd* [1993] 3 MLJ 36; *Loh Holdings Sdn Bhd v Peglin Development Sdn Bhd* [1984] 2 MLJ 105).

[12] We are therefore of the view that the appellant's statement of claim in the present case is not appropriate to be struck out under sub-para (1)(a) of r 19.

[13] Sub-paragraph (1)(b) deals with pleading which is 'scandalous, frivolous or vexatious'; while sub-para (1)(d) deals with 'an abuse of the process of the court'. In *Murray v Epsom Local Board* [1897] 1 Ch 35 it was held by the court that, 'scandalous' generally refers to matters which improperly cause a derogatory light on someone, usually a party to an action, with respect to moral character or uses repulsive language (see also *Boey Oi Leng (Trading as Indah Reka Construction and Trading) v Trans Resources Corporation Sdn Bhd* [2001] MLJU 566; [2001] 4 AMR 4807; and *Indah Desa Saujana Corp Sdn Bhd & Ors v James Foong Cheng Yuen, Judge, High Court Malaya & Anor* [2008] 2 MLJ 11). The words 'frivolous' or 'vexatious' generally refer to a groundless action with no prospect of success, often raised to embarrass or annoy the other party to the action.

[14] In considering whether any proceedings were vexatious or frivolous, one is entitled to and ought to look at the whole history of the matter and it is

not to be determined by whether the pleading discloses a cause of action or not (see *Attorney General of Duchy of Lancaster v London & North Western Railway Co* [1892] 3 Ch 274; and *Re Vernazza* [1959] 2 All ER 200). It was decided in the above case of *Attorney General of Duchy of Lancester* that 'frivolous or vexatious actions mean cases which are obviously frivolous or vexatious or obviously unsustainable'.

[15] Raja Azlan Shah J (as HRH then was) had made the following observation in the case of *Malayan Banking Berhad v Gan Kong Yam* [1972] 1 MLJ 32:

> No precise legal definition can be found as yet, as to the meaning of 'no reasonable defence' or 'frivolous or vexatious' or 'tending to delay the fair trial or the action', but as can be observed a pleading will not be struck out under this rule 'unless it is not only demurrable but something worse than demurrable', that is, such that no legitimate amendment can save it from being demurrable: per Chitty J, in *Republic of Peru v Peruvian Guano Co*.

[16] For sub-para (1)(b) the learned judge was entitled to look at the affidavit evidence adduced by the parties. She must appreciate that it is not appropriate in striking out proceedings to resolve conflict of evidence (as in the present case) on affidavits; the proper time for doing so is at discovery or by cross-examination of witnesses or deponents during trial. Contested matter, where facts are in dispute, could not be resolved by affidavit evidence. In order to invoke the provisions, the underlying fact must not be in dispute and the matter is purely a question of interpretation of fact and the law.

[17] Sub-para (d) of the rule deals with pleading which is 'an abuse of the process of the court'. In *Castro v Murray* (1875) LR 10 Ex 213, the phrase 'abuse of the process of the court' had been described generally to refer to situation where the court's process is used for an unlawful object and not for the actual purpose intended to achieve justice. It involves a process which is contrary to good order established by usage. In dealing with this sub-para (1)(d), the judge is entitled to look at the affidavit evidence, on the same principle applicable to sub-para (1)(b) ie striking out is not appropriate when there is conflicting evidence in the affidavits. The judge must determine and decide the issue in question by consideration of the undisputed facts.

[18] The rule on dealing with affidavit evidence had been clarified by Lord Templeman of the Privy Council in the case of *Tay Bok Choon v Tahansan Sdn Bhd* [1987] 1 MLJ 433, where it was said:

> At the end of the day, the judge must decide the petition on the evidence before him. If allegations are made in affidavits by the petitioner and those allegations are credibly denied by the respondent's affidavit, then in the absence of oral evidence or

cross-examination, the judge must ignore the disputed allegations. The judge must decide the fate of the petition by consideration of the undisputed facts.

[19] In another Privy Council case — *Eng Mee Yong & Ors v V Letchumanan* [1979] 2 MLJ 212, it was held that since there was a conflict of evidence on affidavit that could not be resolved by rejecting the evidence of one side, then the matter of conflict had to be determined by examining the deponent of the affidavit in order to determine the truth of the relevant issues.

[20] Judges dealing with striking out application under O 18 r 19 of the RHC must always bear in mind that the power to strike a case under the order without having to go for trial should be exercised sparingly and only in a plain and obvious case. The procedure is of a summary nature. The party affected should not be deprived of his right to have his case proceeded by a proper trial unless the claim is obviously unsustainable. The Federal Court in the case of *CC Ng & Brothers Sdn Bhd v Government of State of Pahang* [1985] 1 MLJ 347, had said that 'the inherent power to dismiss an action summarily without permitting the plaintiff to proceed to trial is a drastic power. It should be exercised with utmost caution' — It is a power which ought to be very sparingly exercised and only in very exceptional cases, (per Lord Herschell in *Lawrence v Norrey* — as cited in *CC Ng & Brothers*).

[21] Some judges described the power to strike out the plaintiff's statement of claim as 'draconian' — in the sense that the plaintiff is being deprived completely from having his day in the court of law to establish his claim by adducing evidence and calling of witnesses. If not properly exercised, the court in effect is closing its door for the plaintiff to have his recourse to justice. If the application by the defendant is dismissed, the case will still go for trial and the defendant can still have his second bite of the cherry during trial. On the other hand, if the application is allowed and the case is struck out (as in the present case before us) the plaintiff will obviously lose everything.

[22] The power under O18 r 19(1) of the RHC is not only confined to the power to strike out pleading or claim. It also empowers the court to amend any pleadings, in appropriate case. To facilitate that, the court may order the action to be stayed, so as to give time to the plaintiff to effect the necessary amendment to the pleadings or the statement of claim. Where the pleadings are defective and the opposing party seeks to strike out those pleadings, the court ought not to act summarily if an amendment can correct the defect (see *Kuala Lumpur Finance Bhd v KGV & Associates Sdn Bhd* [1995] 1 MLJ 504; and *Lim Weow @ Lim Neu v Perwira Habib Bank Malaysia Bhd* [2001] MLJU 328; [2001] 2 AMR 1307).

[23] Striking out application under O 18 r 19(1) of the RHC should not be

taken lightly by judges. No doubt, the application is recorded as an 'interlocutory matter' in the court dockets, but the effect of the striking out is far more serious and drastic compared to the decision after full trial. In full-trial cases, the plaintiff is given full chance and opportunity to establish and prove his claim before the court of law. However, in striking out proceedings, his claim is struck out even before he has the chance and opportunity to prove his case.

[24] Based on the above considerations we are satisfied that the learned judge in the present case had erred in striking out the appellants' claim against the respondent under O 18 r 19 of the RHC. We are of the considered view that the appellants' claim against the respondent as laid down in the statement of claim is not obviously unsustainable. It discloses a reasonable cause of action; it is not scandalous, frivolous or vexations; and also not an abuse of the process of the court.

[25] The issues raised by the respondent (in para 6(a)–(f) above) are not conclusive against the appellant. The issues of wrong forum, res judicata, inconsistent or conflicting decisions, and that the claim is bound to fail, are all serious issues that need to be determined at trial. They involve some questions of law and fact that require mature considerations and further argument. Obviously, they are not to be resolved at this stage of the proceedings by striking out the claim under O 18 r 19 of the RHC. It is not obviously unsustainable to be struck out.

CONCLUSION

[26] Based in the above considerations we allow the appeal with costs in the cause and we order that the matter be remitted to the High Court for trial. We also make an order that the deposit be refunded to the appellant.

Appeal allowed with costs in the cause and matter to be remitted to High Court for trial.

Reported by Kanesh Sundrum